Supreme Court, U.S.
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(7)

No. 97-136

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

On Petition for Writ of Certiorari to the
Fourteenth Court of Appeals for the State of Texas

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF ERROR

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52 pgs

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo
2. Jose Vicente Gustilo, III
3. Nadina Maravilla Gustilo
4. Joseph A. Horrigan
5. June Salvacion Gustilo
6. Kanaly Trust Company

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF ERROR

I.

This Supplemental Brief Contains Subject Matter Not Previously Discussed Which is Newly Discovered and of Extraordinary Importance and Relevance to Issues in This Appeal

This supplemental brief is largely the result of receipt of an amicus curiae brief earlier this day (September 24, 1997) filed by a Richard N. Countiss, a former Justice of the Texas Seventh Court of Appeals, who, from the inside, saw the denial of justice and want of full and due process visited upon litigants by a "turf" dispute being carried out in Fourteenth Court of Appeals.[1]

II.

Jurisdiction Concerning Matters Raised in This Supplemental Brief

The Supreme Court has jurisdiction of this case as set forth in the Petition for Writ of Certiorari and Petitioners' Reply Brief. This Supplemental Brief concerns matters having the specific, serious and cumulative effect of denying justice and due

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[1] A mandamus proceeding, *Leslie Brock Yates, John S. Anderson, J. Harvey Hudson, Wanda McKee Fowler, and Richard H. Edelman, Justices of the Fourteenth Court of Appeals, Relators, v. The Honorable Paul C. Murphy, Chief Justice of the Fourteenth Court of Appeals, Respondent*, No. 97-0734, arose in the last days of August. Though Petitioners were aware of a dispute in the court, the clear implications concerning effects upon these litigants of the court's practices were just made clear to them by their receipt today of an amicus curiae brief bearing a certificate of service dated September 18, 1997 and probably filed the next day.

process to Petitioners.[2] As such, redress must be afforded in the national courts as required by previously-cited international law and domestic constitutional concerns.

III.

Statement of the Facts

Petitioners attach in appendices relevant excerpts from the affidavits and judicial declarations (pleadings) of six of nine sitting judges of the Court of Appeals for the Fourteenth District of Texas ("14th Court of Appeals"). These and related documents show beyond controversy that Petitioners have been denied full access to mandated adjudicatory duties of the court as provided, *inter alia*, by state procedural rules and statutes, viz:

1. Under Rule 79(e) Texas Rules of Appellate Procedure, any justice receiving a circulated appellate brief or motion for rehearing en banc may request a vote of the en banc court to hear or to rehear a case en banc.

2. Under Rule 100(c) Texas Rules of Appellate Procedure, any justice receiving a circulated motion for rehearing may, if joined by a sufficient number of justices to constitute a majority of the court, require that the motion for rehearing be granted.

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[2] The facts upon which this supplemental brief stands are not in dispute and are based upon the affidavits and sworn pleadings of six of the nine sitting justices of the Fourteenth Court of Appeals. The three remaining Justices have not contested them. Prejudice to these specific Petitioners is distinct and particular to them and arises, in part, from failure of the relatively inexperienced panel handling their appeal to have properly performed mandatory functions of the Court which, in due course of correct procedure, would have been corrected when brought to the attention of the full court (a presumption may not be indulged that the full court would not have done its duty if permitted to do so).

3. Under Rule 100(f) Texas Rules of Appellate Procedure, a majority of the justices, with or without a motion, may call for an en banc review with or without an en banc conference.

4. Under Section 22.223(b) Texas Gov't Code Ann. (Vernon 1988), the concurrence of a majority of the court sitting en banc is necessary for a decision. Thus denial of a motion for an en banc rehearing by the Chief Justice, without circulation of the entire court, is beyond his authority and works an obvious denial of due and fair hearing upon the movant.

5. Under Rule 19(f) Texas Rules of Appellate Procedure, a "Single Justice or Judge ... may not act upon a motion ... for rehearing."

The present chief Justice of the 14th Court of Appeals has abolished "full-court circulation", and justices of the court are not permitted to vote "en banc" (see excerpts of Memo from Chief Justice Paul Murphy to Justice Richard Edelman February 20, 1997, attached to Affidavit of Justice Edelman (Appendix S1 hereto); also excerpts from affidavits of Yates and Hudson (Appendices S2 and S3 hereto).

Five justices of the 14th Court of Appeals have stated that "Requests for en banc consideration are not circulated among the full court", and, when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by the Chief Justice, Paul Murphy. (Excerpt from Petition for Writ of Mandamus under oath and signed by each of five Relators, and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy, at page 2, Appendix S4).

The first paragraph, under "STATEMENT OF THE FACTS" of sworn Petition for Mandamus signed by Justices Leslie Brock Yates, John S. Anderson, J. Harvey Hudson, Wanda McKee Fowler, and Richard H. Edelman states as follows:

> "Since at least January of 1995, when Relators began serving thereon, the Fourteenth Court of Appeals has never voted on whether to consider a motion for rehearing en banc. *(Ex. 1, para. 3).*" Requests for en banc consideration are not circulated among the full Court, and even when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by Respondent. *(Ex. 1, para. 3; 3, para. 1, 5 & 12).*"

Just-discovered disorder, averred in affidavits and pleadings of six justices, is shown to have prevailed during the pendency of this appeal, especially during the pendency before the court of a motion for rehearing and a motion for rehearing en banc filed in this case July 18, 1996. Wholesale departure of appellate court from its prescribed duties, functions, customs and practices and from controlling law denied these alien petitioners all opportunity to acquaint potentially-interested senior members[3] of the court with the substance of appellate issues, exceptions and proposed corrections of the opinion of the then basically novice panel.

Under particular circumstances of this case, opportunity for prejudice was great. Consequences of aborted opportunity for rehearing have predictably led to extraordinary circumstances prevailing in this appeal, viz: (1) case has been determined on basis of assumptions not borne out by record, (2) central controlling issues of Philippine law upon which rights of Petitioners depend have not been discussed or considered, and (3) rules of law have been adopted on mistaken misapplication of decisions of intermediate courts found to be in conflict with authority of Texas Supreme Court. Thorough and fully-supported motions for rehearing and for rehearing en banc filed by Petitioners

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[3] Of the three justices on the panel that decided this case, two were elected to begin service in 1995. The third had recently succeeded by appointment to Justice Murphy's seat which became vacant upon his appointment to Chief Justice.

(Appellants below) demonstrated error and mistake in three categories just stated. Respect for law requires a presumption that objective errors of the Court of Appeals would have been corrected and greater deference would have been given controlling Supreme Court and Philippine authority if the full court had been circulated with Petitioners' motion for rehearing en banc. A right, protected under law, for an opportunity to persuade the full court to review the adverse panel decision was denied in a manner that did not comport with any recognizable process of law.

IV.

A Question Regarding Deference to be Accorded Findings of Opinion

Of equal concern to bench and bar are facts made clear from the affidavits and counter-affidavits that not one of the six embroiled Justices has evidenced in those writings a "due process" or "open access to the court" concern as regards the fate and fortunes of litigants before the court. No mention is made of the responsibility the court exercises as the ultimate finder of facts under the Texas Constitution Article 5, Section 6. The effort and considerable expense required for adequate documentation of en banc rehearings so that each justice will have convenient reference to necessary facts and authority is disparaged by evident non-concern. A question is unavoidably raised as to the integrity of a court (or faction of a court) that invites expensive, but essentially useless, motions for rehearing. Then there is the further concern for the review process in the Texas Supreme Court where questions must first be narrowed and pressed upon the court of appeals so that application for writ of error may be narrow and precise and necessary only where the intermediate court fails to correct itself. Certain error occurs only when the court rules. Should the court never confront its own error? By reason of the court's clear disregard of these matters, Petitioners contend that deference to the court's findings, in the face of compelling and objectively contradictory

record evidence, should be made subservient to the demands of justice in this appeal.

V.

Summary of Argument

Alien Petitioners were deprived of their rights to require circulation of Motion for Rehearing and Motion for Rehearing En Banc to all Justices of the appellate court.

Alien Petitioners were denied their opportunity for rehearing en banc or rehearing as result of unauthorized decision of Chief Justice or of panel in absence of any circulation of motions among all Justices of the court.

Because Motion for Rehearing and Motion for Rehearing En Banc met necessary criteria for rehearing, illegal decisions, by which circulation of motions was denied and by which motions were rejected, resulted in prejudice to alien Petitioners, denial of justice, and denial of due process.[4]

VI.

Brief of Argument

Petitioners are entitled to all rights dependent upon adherence by appellate court to explicit rules by which it is governed. Petitioners' right to have motion for rehearing en banc and motion for rehearing circulated among the justices of the court and to have those motions not under exclusive control of a panel or a Chief Justice hang upon law that is directory and explicit--i.e., Rules 79(e); 100(c),(f); 19(f) Texas Rules of Appellate Procedure and Section 22.223(b) Texas Government Code Ann.

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[4] Factually incorrect opinion, ruling on a defense not raised, unfairly handiccped appeal.

(Vernon, 1988). The following is borrowed from mandamus brief of a majority of the court, at page 5 and note 7 on same page, viz:

> "The Fourteenth Court of Appeals is not in compliance with either Rule 79(e) of the Texas Rules of Appellate Procedure or Section 22.223 of the Government Code. These provisions are not advisory, but are, by their terms, mandatory.[7] . . . Interpretation of a statute is a pure question of law over which a judge has no discretion. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1977). Thus, a judge's erroneous legal conclusions, even in an unsettled area of the law, is an abuse of discretion. *See Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (Tex. 1996). . . .
>
> "[7] Where a statute is clear and unambiguous, it must be interpreted and applied according to the plain and common meaning of the words and terms used. *Commissioners Court v. Agan*, 940 S.W.2d 77, 80 (Tex. 1977); *Memorial Hospital v. McCown*, 927 S.W.2d 1, 4 (Tex. 1996). *But cf. Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (stating that statutory language that appears to impose a mandatory duty may be interpreted to be only directory when necessary to fulfill the legislative intent of the statute); [other citations omitted]."

It follows that the arguments concerning effect of Rule 79(e) and Section 22.223 of the Government Code apply as well to Rule 100(c) and (f) and Rule 19(f). Thus it is ironically clear that a majority of the court, in effect, agrees that Petitioners have been denied mandatory and due process in their court. Petitioners' right to a minimum of remand is not in doubt, though an even greater right to reversal under Philippine (and Texas) law is established by the Petition for Writ of Certiorari.

Non-circulation of motions for rehearing en banc and for rehearing denied Petitioners statutory opportunity for correciton of error as pointed out in the motions. The following is digested from the motions:

Panel held that judicially-admitted fact **must also be established by admitted evidence**. Conflicts with *Houston First American Savings v. Musick*, 650 S.W.2d 764 (Tex. 1983) and *Valdez v. Moore*, 476 S.W.2d 936, 939-40 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.). Panel also holds that sworn testimonial declaration in prior suit (petition under oath), otherwise meeting Mendosa (infra) tests, fails as preclusive declaration **because made in different suit**. Conflicts with *Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692 (Tex. 1980); *Moore v. Neff*, 629 S.W.2d 827 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.); and *Huckin v. Connor*, 928 S.W.2d 180 (Tex.App.--Houston [14th Dist.] 1996, reh'g overruled). (From motion for rehearing en banc pp.14-17. See Appendix S5 hereto at pp.A-7 - A-11.)

Panel held it was not bound to follow determination by Philippine intermediate court determining invalidity, under Philippine law, of Philippine agreement between Philippine citizens. **(Opinion was affirmed by Philippine Supreme Court.)** Conflicts with decisions of the Texas Supreme Court, viz: *Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986); *Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1981); and *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986). Panel opinion also conflicts with Philippine statutory law and other Philippine Appellate Court decisions upon exclusively Philippine questions of impugnation of legitimacy and filiation and succession of Philippine children. See Civil Code of the Philippines Ann. 9th Ed., 1978, Article 2035 (Appendix W, Petition for Writ of Certiorari [hereafter "Pet. for Writ"]); *Gustilo v. Agdamag*, CA-G.R. SP. No. 28626, Republic of the Philippines, Court of Appeals, Manila, Seventh Division, 1993 (Appendix I, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 255 (Appendix M, Pet. for Writ); Civil

Code of the Philippines Ann. 9th Ed., 1978, Article 256 (Appendix M, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 263 (Appendix K, Pet. for Writ); *Republic v. Bartolome*, Vol. 138 Sup. Ct. Reports Ann. 442, Sept. 8, 1985 (Appendix O, Pet. for Writ); *V.D.A. DeCastro v. Republic*, Vol. 134 Sup. Ct. Reports Ann. p.14, January 27, 1985 (Appendix P, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 15 (Appendix Q, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 71 (Appendix R, Pet. for Writ); and *Dakunzo v. Edgye*, 117 A.2d 508 (N.J. Sup. Ct. 1955). (From Motion for Rehearing En Banc pp.17-19 and 24-25, Appendix S5 at pp.A-12 - A-20.)

Panel held recitations in **ex parte, agreed judgment** to be **binding findings of fact, affecting the rights of Petitioners** . (The rights of Appellants were diminished without either Appellant having been afforded due process of law.) Conflicts with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Garza v. Maverick Market, Inc.*, 768 S.W.2d 273 (Tex. 1989); *United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna*, 896 F.2d 949 (C.A.5) (Tex. 1990); *Silva, as next friend of E.L.S. v. Enz, as Admin. and next friend of Jason Eng*, 853 S.W.2d 815 (Tex. App.--Corpus Christi 1993, writ denied); *Joplin v. Meadows*, 623 S.W.2d 442 (Tex. Civ. App.--Texarkana 1981, no writ). Panel decision deprived appellants of due process by concluding against appellants **agreed, ex parte findings of different court, with respect to which Petitioners had neither notice nor an opportunity to participate** were erroneously made conclusive against them. Conflicts with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984, reh'g denied); *United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna*, 896 F.2d 949 (C.A.5) (Tex. 1990); and *Edinberg Cons'd Sch. Dist. v. INA and CIGNA*, 806 S.W.2d 910 (Tex. App.--Corpus Christi 1991, no writ). (From Motion for Rehearing En Banc pp.21-23 and 29-30. See Appendix S5 hereto at pp.A-21 - A-27.)

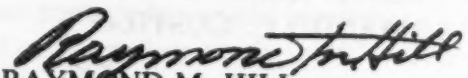
Petitioners' Reply Brief points out numerous examples of the appellate courts having adopted facts not in the record. That court's entire basis for rejecting the Philippine decision finding agreements to be void is outside the record factually (see Appendix S8 hereto at pp.A-28 - A-32) and relies upon a defense not raised or briefed by Respondents before the opinion--i.e., that the Veloso decision was issue preclusive. See Appendix S7 hereto at p.A-15 (from the Motion for Rehearing En Banc).

From the foregoing it is apparent that Petitioners had substantial opportunity based upon attendant rights that was foreclosed by the unlawful practices of the Fourteenth Court of Appeals--practices that not only chilled prospects of a rehearing, but virtually denied such a possibility. This was impermissible denial of justice and due process.

CONCLUSION

The writ of certiorari must issue as prayed, and the opinion below must be reversed to conclude this litigation. If remanded, instructions on matters of comity must be complete. The court below must address every controlling issue not disposed of by the Supreme Court. All other relief which comports with justice is requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Supplemental Brief in Support of Application or Writ of Error were sent by certified mail on September 25, 1997, to each of the following counsel of record:

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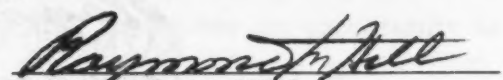

RAYMOND M. HILL

APPENDIX S1

Excerpt from Memo of February 20, 1997 from Chief Justice Paul Murphy to Justice Richard Edelman (Exhibit 7 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy)

To: Justice Richard Edelman

From: Chief Justice Paul Murphy

Subject: Memo of February Judges Meeting

Date: February 20, 1997

. . .

(Text Omitted)

En Banc Decisions: This Court's past experience with full-court circulation was mercifully brief. Several years ago, one of the former judges suggested this procedure. Judge Brown as I recall, reluctantly agreed. As it turned out, it became a burden for the judges and the staff. Copying the motions, making copies of the opinions (usually lengthy in these cases), and distributing the motions became an administrative nightmare for the staff. After circulation, some judge would inevitably claim that he had not received a copy despite the staff's records showing distribution and extra copying ensued. Some judges insisted on copies of all briefs filed in the case, requiring more copying time. Obtaining timely rulings became extremely time consuming. Some judges wouldn't take the time to read them or would vote without give the motion any consideration. Keeping abreast of all the motions and rulings in a timely manner was taking an inordinate amount of time from opinion writing especially when the opinion was from another panel. The result was an unacceptable delay in rulings on the motion and a thankful early return to the way it had been done.

APPENDIX S2

Excerpt from Affidavit of Leslie Brock Yates (Exhibit 1 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraph 3])

"3. Since joining the Court in December of 1994, I have not been asked to vote on other matters of Court business, including budgets, Court Expenditures and Court security. Neither have I been asked to vote on, nor express an opinion about, whether a case should be granted an en banc rehearing."

APPENDIX S3

Excerpt from Affidavit of J. Harvey Hudson (Exhibit 3 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraphs 1, 5 & 12])

"1. In late October or early November of 1995, I met with Chief Justice Murphy regarding a difficult case that was on rehearing before the panel.[1] The panel had been divided on original submission and was divided on rehearing as well. Because the panel was split and one Justice was having difficulty deciding the motion for rehearing, I asked that the cause be reconsidered en banc pursuant to Rule 100(f) of the Rules of appellate Procedure. Chief Justice Murphy denied my request without a vote of the other justices.

. . .

(Text Omitted)

"5. During the early part of March 1997, I asked Chief Justice Murphy to grant appellants'

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[1] I have intentionally omitted the style and cause number of cases referenced in this affidavit. See TEX. CODE JUD. CONDUCT, Canon 3, p.3(b)(11) (1996).

request for rehearing en banc in a case that had been decided by a plurality opinion. When appellants filed a motion for rehearing en banc, I told Chief Justice Murphy that I would grant such motion and asked for an en banc rehearing because (1) the panel had been unable to reach a majority opinion and (2) the plurality opinion was in conflict with the previous decision of another panel. Chief Justice Murphy did not expressly deny my request at that time, but simply advised me to try again to get a majority of the panel members to agree. Although the panel was never able to render a majority opinion, appellant's motion for rehearing en banc was subsequently denied without a vote of the Justices.

. . .

(Text Omitted)

"12. On the last week of June or first week of July 1997, I gave a written memo to Chief Justice Murphy stating that I would vote to grant the appellee's motion for rehearing en banc in a case where the panel had reversed the trial court's judgment on the basis of a prior decision by the Fourteenth Court of Appeals. However, the panel opinion had questioned the soundness of the Court's former decision. Chief Justice Murphy advised me that he wanted to know how the panel members would vote, and I submitted

a memo to him reflecting that all three panel members would grant en banc rehearing and that Justice Fowler had specifically requested a vote on the matter. Thereafter, Chief Justice Murphy advised me that he had overruled the motion for rehearing en banc. The issue was not presented to the full Court."

APPENDIX S4

Excerpt from Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy, at page 2

"Requests for en banc consideration are not circulated among the full Court, and even when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by Respondent. *(Ex. 1, para 3, 3 paras 1, 5 & 12).*"

APPENDIX S5
Excerpts from Pages 14 - 17 of
Motion for Rehearing En Banc

A. THE PANEL HOLDS THAT A JUDICIALLY-ADMITTED FACT **MUST ALSO BE ESTABLISHED BY ADMITTED EVIDENCE**

Established Fact:

*In sworn summary judgment response in respect to which Appellee prevailed below, she listed as "**UNDISPUTED FACTS**" the date of her marriage to Maravilla as being December 24, 1970, and the date of its dissolution as being March 12, 1985 (Appendix Tab 11 [Tr. 194-195]). These facts were also repeated in a separate affidavit attached to the response (Appendix Tab 11 [Tr. 296-297]) and evidenced by attached Philippine marriage license (to Maravilla) (Appendix Tab 11 [Tr. 2297]), decree of annulment (Appendix Tab 11 [Tr. 217-220]), and New Jersey certificate of marriage (to Gustilo) dated August 21, 1982 (Appendix Tab 11 [Tr. 221]).*

Authority:

Houston First American Savings v. Musick, 650 S.W.2d 764, 767, 769 (Tex. 1983) (assertions of fact in pleadings of the parties are regarded as formal, judicial admissions. A fact admitted is conclusively established in the case **without the introduction of the pleadings or presentation of other evidence**.)

Valdez v. Moore, 476 S.W.2d 936, 939-40 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.) (parties making **unqualified recitation in a motion for summary judgment** are bound by that recitation as a judicial admission establishing not only the admitted matter but any necessary inference. **This eliminates the adversary's necessity of proving such element** upon which it relies. For similar holding, see *Dobbins v. Caruthers*, 864 S.W.2d 754, 756 (Tex. App.--Houston [14th Dist.] 1993, no writ) and *Cameron County v.*

Velasquez, 668 S.W.2d 776, 782-83 (Tex. App.--Corpus Christi 1984, writ ref'd, no reversible error).

Rao v. Rodriguez, 1996 WL 260855 (Tex. App.--Beaumont May 16, 1996) (admissions in trial pleadings are regarded as formal judicial admissions. They are conclusive" . . . **"it is unnecessary to submit undisputed issue to jury"** (See page 10 of Westlaw print of opinion).

Opinion: The panel held it would decline to "look at statements made by Nadina in summary judgment responses and summary judgment evidence" . . . **"because these documents were not introduced into evidence . . .".** (See Opinion p.10), though urged by numerous motions.[2]

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[2] Motion in Limine (Appendix Tab 14 [Tr. 2051]); Motion for Special Instruction (Appendix Tab 15 [Tr. 2254]); Motion for Mistrial (Appendix Tab 16 [Tr. 2172 at 2176 - Motion for mistrial is requested in Motion to Strike Nadina Gustilo's Affirmative Defenses as Well as Those of June Salvacion for Whom She Negotiated as Guardian]); Appendix Tab 12 [S.F. 389-393]; Appendix Tab 18 (S.F. 407-425); objection to Jury Question 20 (Appendix Tab 19 [S.F. 1701 last two paragraphs through S.F. 1705, first line]); Appellant's First Amended Motion for Judgment (Appendix Tab 20 [Tr. 2262]); Appellants' Motion for New Trial (Appendix Tab 21 [Tr. 2476]).

B. **THE PANEL HOLDS THAT A SWORN ADMISSION IN A TESTIMONIAL DECLARATION IN A PRIOR SUIT (PETITION UNDER OATH), OTHERWISE MEETING MENDOSA (infra) TESTS, FAILS AS A PRECLUSIVE DECLARATION BECAUSE OF BEING MADE IN A DIFFERENT SUIT.**

Established Fact:

Nadina swore that she was married to Francisco Maravilla on March 17, 1983 in a successful petition for correction of entries in the certificate of birth of her daughter, June Salvacion. The decree of the court discussed as a fact her continuing marriage to Maravilla at the time of the entry thereof (see Appendix Tab 3 [Exh. P38 (Decree) at page 7]; Appendix Tab 13 [Exh. P73 (Petition)]).

Authority:

Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc., 606 S.W.2d 692, 694 (Tex. 1980) (testimonial declarations [pleadings] in a different and previous lawsuit are quasi-admissions, **but they are treated as judicial admissions under circumstances set out in *Mendosa* at 694 [see as adopted in *Cortez*, immediately below]**; if sworn, the admissions are also preclusive as though made in the present case.

Cortez v. Weatherford I.S.D., WL 325090 (Tex. App.--Fort Worth June 13, 1996) (a quasi-admission will be treated as a judicial admission "if it appears that: (1) The declaration relied upon was made during the course of a judicial proceeding. (2) The statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony. (3) The statement is deliberate, clear , and unequivocal. The hypothesis of mere mistake or slip of the tongue

must be eliminated. (4) The giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based. (5) The statement is not also destructive of the opposing party's theory of recovery," (citing *Mendosa*, 694).

Moore v. Neff, 629 S.W.2d 827 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) **(sworn allegation in earlier divorce suit as to existence of marriage was sufficient to preclude proof of a different, continuing marriage existing at the same time);**

Cameron County v. Velasquez, 668 S.W.2d 776 (Tex. App.--Corpus Christi 1984) (the court's opinion adopts and quotes from the related holding in *Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc.*, *id.*)

Huckin v. O'Connor, WL 354734 (Tex. App..--Houston [14th Dist.] 1996) **(sworn pleadings or affidavit used in summary judgment** may suffice to bar proof of contrary facts in subsequent proceeding. (See *Valdez v. Moore*, *supra*, also this court.)

Welder v. Welder, 794 S.W.2d 420, 431 (Tex. App.--Corpus Christi 1990, no writ; *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956), and *Moore v. Neff*, *supra*, further hold that when the testimonial declaration in a **pleading in a previous lawsuit is made under oath** and unexplained, a party in subsequent litigation, having made such previous statement under oath by prior pleading or other testimonial declaration, is barred from attempting to prove inconsistent facts in subsequent litigation.[3]

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[3] Appellants (Plaintiffs/Intervenors) urged upon the trial court below, at every reasonable occasion, the preclusive effect of the sworn declaration by

(continued...)

Opinion: The panel held **Nadina's testimonial declaration in her petition under oath, never retracted, did not meet *Mendosa* test because "pleadings in other actions ... are not conclusive but merely some evidence"** (see Opinion p.9).

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[3](...continued)
Nadina in the Philippine suit and in the court below. See: S.F. 388-393, S.F. 308,310; Tr. 2071 et seq. esp. 2076 para. 3; Tr. 2254 et seq.; Tr. 2950 et seq., esp. 2953; Tr. 2051; overruled Tr. 2057; motion denied, hearing on motions 4/5/93 pp. 129-130; also S.F. 480, motion for trial order.

APPENDIX S6

Excerpts from Pages 17-19 and 24-29 of Motion for Rehearing En Banc

C. THE PANEL HOLDS IT IS NOT BOUND TO FOLLOW DETERMINATION BY PHILIPPINE INTERMEDIATE COURT IN CASE INVOLVING SAME PARTIES AND SUBJECT MATTER DETERMINING THE INVALIDITY UNDER PHILIPPINE LAW OF A PHILIPPINE AGREEMENT BETWEEN PHILIPPINE CITIZENS, CONCERNING PHILIPPINE ESTATE OF DECEASED PHILIPPINE CITIZEN AND DOMICILIARY, CONCERNING PHILIPPINE LAWS OF SUCCESSION. **(OPINION WAS AFFIRMED BY PHILIPPINE SUPREME COURT** PRIOR TO PANEL OPINION AND PRIOR TO APPELLANTS' BRIEF.)

Established Fact:

Philippine Court of Appeals, Manila, Seventh Division, February 16, 1993 reviewed the order of Philippine trial court sitting in probate concerning the compromise agreement. The Philippine proceedings involved the same parties and subject matter involved in this present attempt by Nadina and by June Salvacion to assert the compromise agreement as determining heirship and distribution.[4] *The compromise agreement was found to be "null and void ab initio". The Philippine court stated that "it could never become final and executory" (see Appendix Tab 3 [Exh. P38 at p.8]; also attached as Exhibit to Appellants' Notice of Two Foreign Judgments, filed April 29, 1994).*

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[4] The panel states that the "question before the court was the validity of the compromise agreement" (Opinion p.10, also see Opinion p.17)

Both Defendants raised the issues of waiver, renunciation, repudiation, and assignment of interest clauses of the agreements, claiming these were severable, but the Supreme Court of the Philippines, on March 23, 1994, denied all contentions and defenses of Defendants "for lack of merit" and emphasized that its decision was "final". (See Appendix Tab 22 [decision on motion for rehearing, attached as Exhibit "A" to movant's Motion for Extension of Time for Filing Appellant's Brief, filed in this Court May 9, 1994]).

Authority:

Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986) ("scrupulous adherence" must be given policy of allowing parallel foreign and domestic proceedings [page 306]. The court also held: ". . . once a final judgment is reached in one of the actions the second forum is usually obliged to respect the prior adjudication . . . if both proceedings continue, **there should be only one judgment recognized in both forums**". The court stated as policy that "we must rely on the court system of a sister common law jurisdiction to recognize the same rule of comity we now apply" [page 307]). (The Philippine Republic adopted the British common law. Its courts often cite U.S. authorities.)

Robertson v. Estate of McKnight, 609 S.W.2d 534, 537 (Tex. 1981) (Texas courts will only refuse to enforce foreign law which violates good morals, natural justice, or is prejudicial to the general interests of its own citizens. The law to be applied is to be determined by the most significant relationships test, as set out in Section 6 and 145 of the Restatement [2d] of Conflicts).

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) (a judgment in a second case based on the preclusive effects of a prior judgment should not stand

if the first judgment is reversed. The same issues should not be relitigated between the same parties with the possibility of inconsistent results. **Once litigated in a fair forum, that result should be binding). (Appellees introduced the Philippine trial court decree and relied heavily upon it in all the proceedings below and in this Court. It has now been conclusively reversed.)**

Liberty National Fire Ins. Co. v. Hon. Ted Akin, 1991 WL 378330 (Tex. July 8, 1996) (pendency of an appeal will not defeat claim preclusion).

Texas Beef Cattle Co. v. Jeff Green, 921 S.W.2d 203 (Tex. 1996) (though carefully excepting a suit for malicious prosecution from the general rule because of the nature of a claim for malicious prosecution, the Supreme Court reaffirmed *Scurlock*, stating that it had carefully weighed the alternatives and had concluded that a judgment should be final for purposes of issue and claim preclusion, regardless of the taking of an appeal. The purpose stated was that the court wished to reject the "nonsensical alternative of retrying the same issues between the same parties in subsequent proceedings", [see page 206).For further authority, see Footnote 4.[5]

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[5] *Street, Judge 352nd Judicial District Court, Relator, v. Hon. Second Court of Appeals*, 756 S.W.2d 299, 302 (Tex. 1988) (the Supreme Court reaffirmed its holding in *Scurlock* that a judgment is final for purposes of issue preclusion or collateral estoppel despite the pendency of an appeal); *Seth v. Seth*, 694 S.W.2d 459 (Tex. App.--Fort Worth [2 Dist.] 1985, no writ) (case represents the exception to general rule. The exception applies where a foreign decision is not followed because of the harshness of the foreign law which produces results which are against the public policy of Texas); *J.J. Gregory Gourmet Services, Inc. v. Antones Import Co.*, 1995 WL 456238 (Tex. App.--Houston [1 Dist.] 1995) (citing *Scurlock*, the court holds that a judgment on appeal is considered final for purposes of claim and issue preclusion [page 2]); *Jackson v. Smith Sec. Service, Inc.*, 786 S.W.2d 787 (Tex. App.--Houston [1 Dist.] 1990, no writ) (citing *Scurlock*, the case holds that a judgment is final

(continued...)

Opinion: **The panel held flatly that ". . . the doctrine of res judicata was inapplicable . . . because the Philippine judgment was not final . . ." and "had not been made to [sic] a court of last resort . . ."** at the time Appellants requested that it be noticed by the trial court (see Opinion p.17). **The panel also obviously declined to apply Philippine law expressed in the opinion and confirmed by the Philippine supreme court by which the agreement was made void.**[6]

. . .

(Text Omitted)

F. THE PANEL OPINION AND RESULTS CONFLICT DIRECTLY WITH PHILIPPINE STATUTORY LAW AND AUTHORITATIVE PHILIPPINE APPELLATE COURT DECISIONS UPON PECULIARLY AND EXCLUSIVELY PHILIPPINE QUESTIONS OF IMPUGNATION OF LEGITIMACY OF PHILIPPINE CITIZENS, FILIATION AND SUCCESSION OF PHILIPPINE CHILDREN, AND THE PECULIARLY AND EXCLUSIVELY PHILIPPINE CONSIDERATIONS OF LAW AND POLICY AS APPLIED TO THE DETERMINATION OF THE VALIDITY OF AN AGREEMENT AFFECTING PHILIPPINE SUCCESSION RIGHTS AND STATUS NEGOTIATED AND ENTERED INTO IN THE PHILIPPINES, AMONG EXCLUSIVELY PHILIPPINE CITIZENS DOMICILED IN THE PHILIPPINES

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[5](...continued)
for the purpose of issue and claim preclusion, despite taking of an appeal, unless the appeal is actually a trial *de novo*).

[6] By footnote 6 to the Opinion (page 17), the panel accepts application of Chapter 36 of the Texas Civil Practice and Remedies Code but misapplies §36.007 and misses the point of *Gannon*. Further, their procedural history is simply incorrect. See statement of the case, *supra*.

Foreign law neither discussed nor followed:

1. Under Article 2035 of the Philippine Civil Code (Appendix Tab 34), the Compromise Agreement (Appendix Tab 7) was void ab initio as construed and applied in *Jose Vicente Gustilo, III v. Agdamag* (Appellants Tab 3 [Exh. P38]). On denial of rehearing, all questions of severability being urged were finally rejected by the Philippine Supreme Court.

2. Under Philippine opinion of the Court of Appeals, Seventh Division, *Gustilo, III v. Agdamag*, *id.*, the Compromise Agreement was determined to be void and all affirmative defenses and related claims were denied. The issue of severance of any portion of related defenses or claims of Appellees was finally determined against them by final order of the Philippine Supreme Court denying rehearing of such matter (Exhibit "A" attached to Motion for Extension of Time for Filing Appellants' Brief, filed May 9, 1994).

3. Under Article 263 of the Philippine Civil Code (Appendix Tab 32) and its nearly identical successor, the Family Code of the Philippines, Article 170 (Appendix Tab 35), the commentator in the Philippine Family Code, Nolledo, states concerning the prohibition of placing the legitimacy of the child in question after specified periods of time (one year), viz:

> "Once these periods expire, no action may be entertained anymore by the court. **Thereby the status of the child becomes fixed. The status then can no longer be questioned in any other case or forum."**

See page 54 of the Philippine Family Code, Nolledo (Appellants' Appendix of Philippine and New Jersey Statutes and Authority, second tab):

> **". . . said issue may no longer be inquired into, even by way of defense or in a collateral**

issue in another action for a different purpose (id. p.54).

4. Under Articles 263, 255 and 256 of the Philippine Civil Code, June Salvacion's status as the legitimate child of Francisco Maravilla was fixed, and but one statutory means of impugning the legitimacy of June Salvacion existed. This was an action for impugnation which could not be brought by the mother of the child under Philippine law.

5. The Supreme Court of the Philippines twice made generic determinations that any trial court, on pleadings to correct the record of a certificate of birth, was without jurisdiction or power to adjudicate filiation or heirship. *Republic v. Bartolome*, *supra*, and *V.D.A. DeCastro v. Republic*, *supra*. No decision by the Philippine Supreme Court **permitting the impugnation of legitimacy** by means of "correcting the registry" has been found.

6. Under Article 15 of the Civil Code of the Philippines Annotated, Paras, Ninth Edition 1978 (Appendix Tab 29), setting out the conflicts of law standards of the Philippines, a foreign marriage, if void where performed, would be void in the Philippines; but if not void where performed but bigamous under Article 71 of the Civil Code of the Philippines, would be also void in the Philippines (see Appendix Tab 30).

7. The Supreme Court of New Jersey has determined, upon facts remarkably similar to those in this case, that a bigamous marriage in New Jersey is void from its inception. *Dakunzo v. Edgye*, 117 A.2d 508 (N.J. Sup. Ct. 1955) (Appendix Tab 8). The false and self-serving recitation by Nadina on the application that an annulment has occurred is not a finding or entry by a public official, but is, itself, a cause for invalidity under *Dakunzo* (Appendix Tab 8). The checkmark next to "annulled" is not evidence and is inadmissible against a contrary sworn declaration or judicial admission.

Opinion: The Opinion never discusses the panel's duty to apply the law of the jurisdictions having the most significant relationship with the particular subject matter, such as the agreement for succession and status, and such as impugnation and filiation, succession and heirship, and foreign marriage.

1. The panel Opinion (without discussion) held: Compromise Agreements (Appendix Tab 7) in direct violation of a Philippine statute were, nevertheless, valid. (The Supreme Court of the Philippines has, by affirming an express holding on the matter, determined that the statute (Article 2035 P.C.C., *id.*) applies to the Compromise Agreements and vitiates their every aspect (see discussion, pages 17-19, *supra*. **The panel Opinion cannot be enforced in the Philippines, the domiciliary seat of administration in potential control of the entire estate, because on the day pronounced, it was already in direct conflict with a final decision of the Philippine Supreme Court.**

2. Without discussion or citation of other authority, the panel has rejected as an authoritative expression of Philippine law the opinion of the Philippine Court of Appeals--confirmed by the Philippine Supreme Court--that the Compromise Agreements are void. (Discussion of *Gustilo v. Agdamag* as authoritative and also panel's denial of comity and res judicata duties under private international law is discussed, pages 17-19, *supra*).

3. The panel declined to discuss Philippine law by which the legitimacy of June Salvacion was assured (whether or not records of the Registrar were changed). By its precedent-shattering decision, the panel has rejected long-standing public policy of the Republic of the Philippines protecting the integrity of the family (Sections 263, 255, 256 of the Civil Code of the Philippines) and has permitted a novel means of impugnation of legitimacy and means of establishing family status and inheritance rights with no one representing the interests of the child and other affected parties. The simple, expedient change of the records in the Registrar's office is made to suffice. (This

method of impugnation has not previously been recognized in the Philippines or in the State of Texas.)

4. Without discussion of Sections 263, 255 and 256 of the Civil Code of the Philippines or decisions of the Supreme Court of the Philippines contrary to its Opinion (*Republic v. Bartolome* [Appendix Tab 26] and *DeCastro v. Republic*, *supra*), the panel has concluded that Judge Veloso, in an *ex parte* proceeding to correct a public record, had the judicial power to determine the filiation of June Salvacion upon a petition of her mother not requesting this relief, in an ex parte proceeding seven years after her birth, in which June Salvacion was not represented, and has decided that such representations in a non-contested order are binding upon all parties in this heirship proceeding. (In *Republic v. Bartolome* [Appendix Tab 26] and *V.D.A. DeCastro v. Republic* [Appendix Tab 27], the Philippine Supreme Court held it had "set to rest" any claim that such judicial power existed in a Philippine court as a result of a petition to obtain a correction of the record.)

5. The panel Opinion does not discuss its ruling under any hypothesis that a self-serving entry in an application by Nadina ("[ ] annulled"), not the decision or act of any public official, would have no weight and, more correctly, would be inadmissible against two separate testimonial declarations under oath (one of these declarations the trial court below accepted as "UNDISPUTED FACT" on a summary judgment motion when Nadina was defending by seeking to prove a Texas marriage under Texas Family Code Sections 2.01 and 2.22). Near conclusion of Plaintiffs' case, the court observed: "Counsel, I don't think we are going to have a dispute that she got married to this guy [Maravilla] in 1970 or that there was a civil annulment in 1985" [Appendix Tab 12 (at S.F. 395)]. But the Opinion does declare valid an otherwise invalid, bigamous, 1982 New Jersey marriage of Philippine citizens, void under the laws of the New Jersey licensing jurisdiction (see *Dakunzo*, *supra*) and an abomination under Philippine law (Article 71, Civil Code of the Philippines [Appendix Tab 30]; see item 6 page ____,

supra, and this page, *infra*). This result is made possible by mid-trial rulings by which the trial court refused to give recognition to a plainly-stated, sworn waiver of evidence (judicial admission) made in the record under oath by Nadina.

Inasmuch as the Philippine Civil Code does not allow intrusions upon its jurisdiction to disapprove bigamy of its non-Muslim citizens regardless of the situs at which the marriage license was obtained (see Article 15 [Appendix Tab 29] in conjunction with Article 71 [Appendix Tab 30], *id.*), and because the records of Nadina's annulment in 1985 and her sworn testimonial declaration in the case decided by Judge Veloso are available against her in the Philippine Courts, conflicting decisions may well occur if the Opinion is not corrected. But the error of the panel will perpetuate itself in the Philippines if the Philippine courts show comity deference to the incorrect panel Opinion.

APPENDIX S7

Excerpts from Pages 21-23 and 29-30 of Motion for Rehearing En Banc

E. THE PANEL TREATED RECITATIONS IN THE EX **PARTE, AGREED JUDGMENT** IN AN ENTIRELY COLLATERAL PROCEEDING TO CORRECT CLERICAL ERROR IN A BIRTH CERTIFICATE AS **BINDING FINDINGS OF FACT, AFFECTING THE RIGHTS OF JOVI AND MARY JOY**, THOUGH THEY WERE NOT PARTIES TO THE SUIT.

Established Fact:

Appellee never pled that the foreign decree was enforceable in this proceeding to either estop or prohibit a contrary claim. *Nadina's petition was not one for impugnation of legitimacy or for proof and establishment of filiation or heirship. There is no summary judgment evidence in the record of sexual contact between Armando Gustilo and Nadina Maravilla* ***during the period of time within which she might have become pregnant with the child, June Salvacion***[7]*, and the Veloso order does not provide such proof, which would be unnecessary for the correction of clerical error. (The court did express a vague "back handed" conclusion that*

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[7] Though the issue was stated in argument and in Appellants' motions for summary judgment (see Appendix Tab 25 [Appellants' Brief pages 8, 29, and 31 part D, sub-points j and l]), no sworn summary judgment response ever presented "clear and convincing" evidence of sexual contact with Armando Gustilo during that period of time. The Philippine court (Judge Veloso) concluded that Francisco Maravilla (who did not participate or testify) "ceased living" with Nadina in February 1977 and that since then Nadina "had no carnal relations with any other man". This finding falls far short of the requirements of impugnation under Philippine law, about which the court has been thoroughly briefed.

Nadina did not sleep with anyone else during that time--his information being from a prohibited source--Nadina.) It is uncontested that Nadina was married to Francisco Maravilla at the time she became pregnant and at the time of the birth of June Salvacion and had one previous daughter by Francisco Maravilla. Seven years after June Salvacion's birth, Nadina Maravilla, swearing that she was at that time married to Francisco Maravilla, brought an action, entitled "Nadina Maravilla v. Local Civil Registrar" for the purpose of correcting entries in the record of June Salvacion Maravilla's birth (Appendix Tab 13 [Exh. P73]). ***June Salvacion was not a party to the proceeding in any fashion nor represented by an attorney ad litem or guardian,*** *and the suit could not have been a suit to determine paternity under Philippine law.*[8]

Authority:

Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) (parties or their privies must have been "cast as adversaries" and "had their day in court" in order to be bound under the doctrine of collateral estoppel by the decision of a court).

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[8] The suit was not to determine heirship, as Armando Gustilo was not deceased. **The suit was tried ex parte.** Though an instrument was filed in the proceedings bearing the name "Armando Gustilo", this was before amended pleadings naming him as a party were filed, and the instrument is unproved as to authorship. It did not qualify as summary judgment evidence. Likewise, Francisco Maravilla may have signed the original petition, but it was before he was named as a party in an amended petition, as no service of citation was ever obtained upon him personally. From the record he appears to have been avoiding service. (Compare signature of Maravilla on his marriage license [Appendix Tab 11 (Tr. 2297]) with purported signature on petition [Appendix Tab 13 (Exh. P73)].)

Garza v. Maverick Market, Inc., 768 S.W.2d 273 (Tex. 1989) **(self-serving recitations of non-essential facts in an agreed judgment bind only the parties and their privies.** Similar rule announced in *Edinberg Cons'd Sch. Dist. v. INA and CIGNA*, 806 S.W.2d 910 at 914 (Tex. App.--Corpus Christi 1991, no writ).

United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna, 896 F.2d 949 (C.A.5) (Tex. 1990) (a consent judgment is inadmissible against one who was not a party or in privity with the party and such non-participating entity is not bound - **disposes of claim that objection to prior judgment constitutes a prohibited collateral attack** [see Fn.2]; for there is "no need to attack a judgment, collateral or otherwise, that does not bind it under rules of res judicata or collateral estoppel", citing 41 Tex. Law Rev. 163 (1962).

Silva, as next friend of E.L.S. v. Enz, as Admin. and next friend of Jason Eng, 853 S.W.2d 815 (Tex. App.--Corpus Christi 1993, writ denied) (a prior order disestablishing the presumed father--the mother's husband--as father of E.L.S. was not admissible in a proceeding to determine heirship. The court held, at page 818, **the prior judgment lacked identity of parties and similarity of issues and was "inadmissible", citing *John Deere Co. v. May*, 773 S.W.2d 369, 374** (Tex. App.--Waco 1989, writ denied).

Joplin v. Meadows, 623 S.W.2d 442 (Tex. Civ. App.--Texarkana 1981, no writ) (allegations in divorce petition that husband abandoned wife the day after marriage with child being born to wife 25 months later was not competent evidence about access for the purpose of overcoming presumption of legitimacy; and **the decree of divorce, itself, containing such recitations was merely hearsay**).

Opinion: The panel found that **". . . the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo as a matter of law."** The Philippine decision was treated both **as conclusive summary judgment evidence** and as res judicata of succession issues, and Appellants were treated as being engaged in an unauthorized collateral attack on the Veloso decision. [Appellants, as non-parties, have simply shown the non-eligibility of the decree to control decision on matters in this proceeding. Also, under Philippine law, the decision could not be construed as affecting heirship or filiation. On its face it does not do so. To construe or test judicial power is not to collaterally attack.]

To prevail, June Salvacion had to establish her case by more than "clear and convincing" proof. Her evidence must have been conclusive on summary judgment.

To the extent that the Veloso decision is beyond the pleadings and purports to affect substantial rights of June Salvacion, Mary Joy or Jovi (renders June Salvacion illegitimate and relieves responsibility of her presumed father, diminishes or increases the inheritance of any of the parties), the decision also is clearly **void** according to the cited Philippine law. The decision is now under direct attack before the Supreme Court of the Philippines.

But the decision is simply not admissible in these proceedings nor binding upon Mary Joy and Jovi. **For it to be so would be a denial of due process to Appellants.** (See *Benson, id.*). Further, it is necessary for this court to apply Philippine law to determine the effect of the Philippine decree, if any, beyond providing a mere "correction" of a name in birth certificate. The birth certificate, itself, under Philippine law has no effect, as it is unsigned and unauthenticated.

This court has substituted its own legal analysis of the effect of the Veloso decision for the legal analysis of similar

decisions by the highest court of the Philippines, even though this proceeding involves a Philippine child of Philippine parents who are Philippine citizens and domiciliaries. It is an extraordinary breach of the principles of comity and the law of conflicts in the United States to attempt to adjudicate familial matters and questions of descent among Philippine citizens involving a Philippine estate in a manner directly contrary to Philippine law as interpreted by the highest court in the Philippines.

G. THE PANEL DECISION DEPRIVED APPELLANTS OF DUE PROCESS BY CONCLUDING AGAINST APPELLANTS A PORTION OF THEIR INHERITANCE RIGHTS THEY WERE SEEKING IN A PROCEEDING TO DETERMINE HEIRSHIP IN WHICH THEY INTERVENED. AGREED, EX PARTE FINDINGS OF A DIFFERENT COURT IN AN ACTION TO CORRECT A PUBLIC RECORD, WITH RESPECT TO WHICH MARY JOY, A MINOR, AND JOVI HAD NEITHER NOTICE NOR AN OPPORTUNITY TO PARTICIPATE WERE ERRONEOUSLY MADE CONCLUSIVE AGAINST THEM BY THE PANEL OPINION.

Established Fact:

Neither June Salvacion, who, according to Appellee, lost her legitimacy and whose parents were changed without her participation or consent, nor either Mary Joy or Jovi were participants in the correction of birth certificate proceeding presided over by Judge Veloso in the Philippines. The Philippine "trial" was conducted ex parte according to the representations in the decree itself (Appellants Tab 3 [Exh. P38]; also Appendix Tab 23 [Tr. 589 - Veloso order]), and the proceeding could not have been for the purpose of determining heirship. Strict guidelines apply to impugnation (disestablishment) proceedings in the Philippines. The petition seeks only

correction of the record; so that the proceeding could not have been a proceeding for the purpose of challenging the legitimacy of June Salvacion, who was never even joined as a party through the appointment of an attorney ad litem or guardian.

Authority:

Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) (due process requires that a judgment not bind parties not before the court or in privity with a party who actually litigated the issue in question).

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984, reh'g denied) (judgment not binding against non-parties unless the party or a privy to a party was cast as an adversary).

Edinberg Cons'd Sch. Dist. v. INA and CIGNA, 806 S.W.2d 910 at 914 (Tex. App.--Corpus Christi 1991, no writ) **("self-serving recitations of non-essential facts in an agreed judgment bind only the parties and their privies")**

United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna, 896 F.2d 949 (C.A.5) (Tex. 1990) (a consent judgment is inadmissible against one who was not a party or in privity with the party and such non-participating entity is not bound - **disposes of claim that objection to prior judgment constitutes a prohibited collateral attack**; for there is "no need to attack a judgment, collateral or otherwise, that does not bind it under rules of res judicata or collateral estoppel", citing 41 Tex. Law Rev. 163 (1962).

Dryer v. Greens, 871 S.W.2d 697, 701 (Tex. 1993) (it is **fundamental error to adjudicate a minor's rights when the minor does not have proper, separate**

representation [citing M.K.T.R.R. Co. v. Pluto, 138 Tex. 1, 5-8, 156 S.W.2d 265, 268-60]). In the absence of contrary cited Philippine authority, it will be presumed that Philippine laws also protect Philippine children from being made illegitimate or from status changes with commercial implications. *[Petitioners' Note: This is not a holding of the court but is a footnote to a dissent in which the Chief Justice was joined.]*

Opinion: The panel concluded: ". . . we find that **the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo** as a matter of law" (Opinion p.11) and "**sufficient summary judgment proof to support trial court's finding that June was the daughter and heir . . .**" (Opinion p.14), ". . . arguments . . . raised by appellants . . . constitute a collateral attack" (Opinion p.13, also p.14).

Thus, the panel concluded that the Veloso findings in a proceeding to correct public records also were non-controvertible, clear and convincing summary judgment evidence of filiation, heirship, and non-paternity (impugnation), as well as paternity, and that the ex parte proceeding was binding upon any person who might, thereafter, make a claim against the estate of Armando Gustilo, deceased. (The order does not have sufficient summary judgment findings even if the findings were admissible. Neither impossibility of access under Philippine law nor evidence of insemination by Gustilo are adequately supported by found facts.)

APPENDIX S8

Excerpts from Pages 7-10 of Motion for Rehearing En Banc

. . .

(Text Omitted)

. . . the recitations by the panel appear to Appellants to be decidedly unbalanced and incorrect.

. . .

(Text Omitted)

1. Armando Gustilo, a Philippine citizen, died in December 1986, 10 years ago, when his child, Mary Joy Gustilo ("Mary Joy") was a minor, eight years old and not *sui juris*. She was nine when the Compromise Agreement (Appendix Tab 7) was reached whereby Nadina Maravilla ("Nadina"), the administratrix in the court below, acquired from Mary Joy and her half-brother, Jose Vicente Gustilo, III ("Jovi"), the entirety of the estate being administered in the United States, though none of it was disclosed in the compromise documents or in any accounting or inventory filed in the Philippine probate court. There is no evidence that Mary Joy received any particular sum of money from the estate, and evidence is unclear that her guardian ever got quiet title **for Mary Joy's benefit** to any real property apart from property to which the guardian, Milagros Barco, already had a claimed right. Milagros Barco and various attorneys did receive a large cash payment of about $500,000, possibly from the estate, for the benefit of Mary Joy. But the record does not directly reflect its source. Jovi had difficulty in obtaining titles, but he was more successful in protecting his inheritance, using similar "self help" methods to those employed by Nadina. He did "take possession" of certain properties he believes to belong to him.

2. Probate proceedings were initiated in the Philippines by Milagros Barco's filing of an application for letters of administration as the guardian and next friend of Mary Joy Ann Gustilo, a daughter of the deceased. Nadina, claiming to be the widow of the deceased Gustilo, intervened to stay proceedings pending her negotiations for a settlement with applicant and Jose Vicente Gustilo, III. **Before Compromise Agreements (Appendix Tab 7) were made, Nadina secretly filed an application for letters of administration in the probate court in Houston, Texas, in which she swore that she and her daughter, June Salvacion, were the only heirs. She mentioned no other claimants.** Notice was issued to no other parties. Nadina swore that the deceased, Armando Gustilo, was a domiciliary of the State of Texas and that all of the deceased's assets reflected in the first inventory she filed (later amended) were community assets. (Nadina, not Appellants, was the party desiring two bites of the apple.) **After having obtained an order of the court appointing her as administratrix** of the estate of Armando Gustilo, deceased in Houston (the claimed domiciliary estate), she negotiated with the heirs, Mary Joy Ann Gustilo and Jose Vicente Gustilo, III, and obtained their agreement **for a price** to quitclaim to her their rights in all of the assets of the estate excepting a specified list of properties and to allow her to be administratrix of the estate in the Philippines. The estate disclosed in the Compromise Agreements (Appendix Tab 7) filed in the Philippine probate court reflected a small estate of about $100,000. Heirship status was stipulated in the agreement.

The panel has concluded that Nadina, the administratrix of the Texas probate proceeding, was within her rights to pay cash to Jovi and to the guardian of the minor child, Mary Joy, and to promise--in the future--to convey or quitclaim to them certain Philippine properties in exchange for assignment to her of all of the remaining estate properties, **inclusive of the entire estate under administration in Texas**.

The inheritance of two minor children, as well as that of Jovi, was seemingly passed effectively to the administratrix, Nadina, in her individual capacity, with no probate court oversight or scrutiny of the obvious "insider" fiduciary transaction prohibited by Section 352 of the Texas Probate Code. The aftermath is that, today, the Agreement has been ruled "void" in the Philippines, the orders of the Texas probate court for Nadina to account or to permit discovery or to return funds and the like, remain unsatisfied (see Appendix Tab 1 [Exh. P31, P32, P36], and an expensive jury trial has replaced the statutory scheme requiring application and approval. There will be no Texas remedy under the uncorrected panel Opinion. (But the domiciliary [Philippine] estate which can claim the right to administer all personal property may look to a decision of the Philippine Supreme Court to support any demand it may make for collection or distribution of the funds now in the Texas administration--an assured conflict.)

Nadina presented the settlement agreement, with its attached inventory of only a few Philippine assets, to the court sitting in probate in the Philippines. Judge Agdamag did give approval. Subsequently, Jose Vicente Gustilo, III and Mary Joy Ann Gustilo moved, by separate motions, for the court to set aside its order approving the agreement. The Supreme Court of the Philippines ultimately confirmed that the agreement was void under Philippine law and should not have been approved. (It should not have been approved in Texas in this proceeding.) **Since the Philippine Supreme Court opinion, Appellees have not argued with cited authority that the agreements are not, in fact, void under Philippine law and that Philippine law does not apply as the standard by which they must be judged.**

In the United States in the probate court below, Jose Vicente Gustilo, III and Mary Joy Ann Gustilo filed a complaint to remove the administratrix upon grounds of defalcation with funds of the estate, failure to have sought a determination of heirship for a period of four years, and failure to gather and account for properties of the estate. (Nadina today is still in

default of the probate court's order for her to return $250,000 [Appendix Tab 2 (Exh. P16)].) At approximately mid-point in the hearing on the complaint for removal of the administratrix, she agreed to resign. (The Appellees had vigorously claimed that the Compromise Agreement [Appendix Tab 7] and Judge Agdamag's approval effectively estopped Mary Joy and Jovi from either claiming standing or removing Nadina.) Before trial Nadina was also removed as administratrix in the Philippines as a result of the decisions of the Philippine Court of Appeals (Appellants Tab 3 [Exh. P38]).

An application for the determination of heirship was filed in the court below by Dr. Gerardo Gustilo on the 12th day of April, 1991. Jose Vicente Gustilo, III intervened in this application. Mary Joy Ann Gustilo filed a parallel application. Undersigned counsel was retained by both Jovi and Mary Joy, and the applications of the Appellants are combined in the Third Amended Response and Joinder in Support of Application for Declaration of Heirship (Appendix Tab 4 [Tr. 1173]).

After cross summary judgment motions regarding June Salvacion's claim of heirship and a summary judgment motion against Nadina's claim to be surviving widow were resolved against Mary Joy and Jovi by the probate court below, and after Mary Joy and Jovi prevailed in their heirship claims by partial summary judgment, trial was commenced on the amended pleas in intervention of Mary Joy (through her guardian, Milagros Barco) and Jovi.

Most of the grounds of error made the subject of this appeal relate to the partial summary judgments and the subsequent trial which was concerned with two issues, primarily:

1) Attempted enforcement by June and Nadina of void Compromise Agreements, and

2) Attempted establishment by Nadina of a claim to heirship through a void and bigamous marriage.

The Compromise Agreements are simply void under authoritative decision of the Philippine Supreme Court. Likewise, all defensive issues related to the Compromise Agreements (Appendix Tab 7) are determined against Appellees, who are barred from offering evidence to support them by decision of the Philippine Court of Appeals in *Gustilo v. Agdamag* (Appellants Tab 3 [Exh. P38]).

The panel is clearly in error in supposing that Appellants have not thoroughly attacked the prima facie case of Nadina (Opinion p.7). The judicial admissions and testimonial declarations under oath specifically urged upon the trial court as a basis for instructions and barring evidence were conclusive and are considered as excluding all opposing evidence. There is no evidence to support Jury Question 20 in respect to the second paragraph of instructions in the charge under Question No. 20 concerning subsequent marriages during lifetime of spouse in previous marriage. (See Appendix Tab 6 [Jury Question 20 is at Tr. 2355]). Further, the findings of the Philippine Court of Appeals in *Gustilo v. Agdamag* regarding Nadina's first marriage and the date she claimed it was annulled are not being employed as an additional attempt to prove up the record or documents evidencing such claims, as the panel has supposed. They are merely findings by the Philippine court as to what Nadina claimed in that proceeding in which all parties were present. (The panel gave conclusive effects to Judge Veloso's agreed findings [*Maravilla v. Local Civil Registrar* (Appendix Tab 13)] from an ex parte hearing not including Mary Joy, Jovi, or June Salvacion as parties.)

Appellants have argued that the Compromise Agreement must be construed and enforced or denied enforcement strictly in accordance with Philippine law. Appellants moved the court below for instructions on this point, opposed related jury questions, filed a motion and amended motion for judgment, and

otherwise throughout the trial protected their position that all settlement-related issues were concluded against Defendants. Yet, the Agdamag decision by the trial court and the Compromise Agreements which had been declared to be void *ab initio* were introduced into evidence by Appellees over the strenuous objections of Mary Joy Gustilo and Jose Vicente Gustilo, III, who urged upon the court their claims that they were void and were in disregard of the doctrines of res judicata and comity, as well as stare decises and law of the case (the domiciliary administration controls over the ancillary administration) (Appendix Tab 5 [S.F. 559-565]). The exhibits were extraordinarily prejudicial and were a deliberate introduction of matter argued to the jury as though enforceable, though clearly found by the Philippine Appellate Court to be void. The Philippine administration is the domiciliary administration of the estate. Appellate decisions in the Philippine administration should, per force, control this ancillary administration in determination of matters, such as the effect to be given a Philippine agreement relating to succession and distribution.

The panel has concluded that Rea, Appellees' expert, possessed some useful knowledge beyond that held by every member of the jury concerning the evaluation of Philippine property he had never seen (he was unable to identify property as to kind or character--i.e., whether improved, unimproved, rural or urban--and he found that a suitable standard of evaluation was to assume that all properties were worth about P 500,000 (pesos) apiece (Appendix Tab 8 [S.F. 1316-1317]). He said he was not an expert and had no experience appraising properties (see Appendix Tab 9 [Appellants' Brief p.36] and Appendix Tab 10 [S.F. 1162, 1226, 1329-1330)]. Nadina Gustilo, on grounds of potential self-incrimination, refused to identify the source of the funds she said she paid Appellants and refused to produce cancelled checks, deposit slips, and the like, reflecting the payment. Rea assumed the funds were from the estate and made a deduction that did not result in actual diminution of any account whose records were produced. This,

alone, produced an unquestionable $1,300,000 error favoring Nadina's position. The panel concluded that Jovi and Mary Joy received (from somewhere), respectively, about $700,000 and $600,000, based on the jury's acceptance of Rea's guess. The panel does not mention that **Rea assumed Nadina had an unreported $1,000,000**, but the record reflects **she got an additional $450,000 ($250,000 in checks and $200,000 in support payments she and June received)**. Also, she had control of various seven-figure bank accounts, foreign and domestic, about which she refused to testify. **Then, she also had $1,300,000 she claims to have paid to Jovi and Mary Joy.** The trial court effectively denied Mary Joy's and Jovi's motion to strike Nadina's affirmative defenses and her own claims as an heir because of her claiming immunity under the Fifth Amendment of the United States Constitution and her failure to give court-ordered deposition testimony or appear at the trial. So, Appellants had no effective judicial assistance to enable them to get the fiduciary to prove up property that came into her possession belonging to the estate.

To crown this injustice, the court below refused properly-offered instructions requiring Nadina, as a fiduciary, to show that she made full disclosure. Then, the court approved jury questions (over objection) inquiring into funds received by Jovi and Mary Joy, but refused a question as to funds received by Nadina.